

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: March 26, 2007)

DO NOT PUBLISH

LEE ANN KAY,)	
as parent of her son,)	
MASON KAY,)	
)	
Petitioner,)	
)	
v.)	No. 05-0393V
)	Statute of Limitations; Dismissal
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

DECISION

Petitioner, Lee Ann Kay (Ms. Kay), as parent of her son, Mason Kay (Mason), seeks compensation under the National Vaccine Injury Compensation Program (Program).¹ Ms. Kay filed a Program petition on March 23, 2005. She alleges that “Mason suffered speech delay and learning disabilities” following “the administration of thimerosal[-]containing vaccines on April 7, 1999.” Petition (Pet.) at 1.

BACKGROUND

Mason was born on April 7, 1999, in Flensburg, Germany. Petitioner’s exhibit (Pet. ex.) 8 at 3. As an infant, Mason received periodic pediatric medical care from physicians in the pediatric clinic at the United States Army Hospital in Heidelberg, Germany. *See generally* Pet. ex. 2. The physicians administered a full complement of routine childhood vaccines to Mason, including

¹ The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

Hepatitis B vaccine on April 22, 1999, Pet. ex. 2 at 10; Hepatitis B vaccine, diphtheria-tetanus-acellular pertussis (DTaP) vaccine, hemophilus influenza type-b (Hib) vaccine, and inactive polio vaccine (IPV) on June 30, 1999, Pet. ex. 2 at 11; DTaP vaccine, Hib vaccine and IPV on August 11, 1999, Pet. ex. 2 at 12; Hepatitis B vaccine, DTaP vaccine, and Hib vaccine on September 27, 1999, Pet. ex. 2 at 13; Hib vaccine, measles-mumps-rubella (MMR) vaccine and varicella vaccine (Varivax) on April 3, 2000, Pet. ex. 2 at 15; and DTaP vaccine and IPV on October 10, 2000. Pet. ex. 2 at 16.

According to Ms. Kay, “Mason’s motor skills were mildly delayed.” Pet. ex. 4 at 23. Indeed, although Mason exhibited “good tone” on August 11, 1999, he was “not rolling over yet.” Pet. ex. 2 at 12. And, a physician noted “[decreased] head control” that the physician attributed to “[decreased] tummy/prone time.” *Id.* The physician determined to monitor Mason’s “tone/head control.” *Id.* By September 27, 1999, Mason would “roll.” Pet. ex. 2 at 13. However, Mason exhibited still “slight head lag,” as well as “slight [decreased] motor skills.” *Id.*

Nevertheless, according to Ms. Kay, Mason developed language skills. *See, e.g.*, Pet. ex. 4 at 23. By age “10 months,” Mason spoke apparently “[s]ingle words,” Pet. ex. 4 at 23; *see also* Pet. ex. 8 at 147, perhaps in both English and in German. *See* Pet. ex. 1 at 17, 82; *see also* Pet. ex. 8 at 147; Pet. ex. 14 at 78-81. Yet, at some point, Mason’s language “skills started to decline.” Pet. ex. 4 at 23; *see also* Pet. ex. 1 at 15, 17; Pet. ex. 3 at 9; Pet. ex. 5 at 2; Pet. ex. 8 at 147. Ms. Kay believed initially that Mason’s speech difficulties “might have been due to a move” from Germany to the United States. Pet. ex. 4 at 23; *see also* Pet. ex. 8 at 147; Pet. ex. 14 at 82.

On April 4, 2001, Mason presented to Cobb Pediatrics in Austell, Georgia, for a “well child” examination. Pet. ex. 1 at 82. A certified pediatric nurse practitioner (CPNP) evaluated Mason. *See id.* The CPNP obtained a medical history that Mason had ceased “talking.” *Id.* The CPNP assessed “[s]peech delay.” *Id.*; *see also* Pet. ex. 1 at 1. The CPNP referred Mason to “Early Intervention - Speech.” Pet. ex. 1 at 82; *see also* Pet. ex. 14 at 1-2. In addition, the CPNP “discussed speech acquisition” with Ms. Kay. Pet. ex. 1 at 82. Mason received a pneumococcal conjugate (Prevnar) vaccination. *See id.*

A multidisciplinary team comprised of an intake service coordinator, an early intervention specialist and a speech-language pathologist (SLP) associated with the Cobb County Board of Health - Office of Children with Special Needs, Babies Can’t Wait program evaluated Mason on May 8, 2001. *See generally* Pet. ex. 14. After testing and observing Mason, the team identified “[a] severe auditory comprehension deficit, a severe expressive communication deficit, significant concerns with social skills including eye contact, attention span, cooperation and interaction, significant concerns with sensory integration skills, and significant concerns with play skills.” Pet. ex. 14 at 84; *see also* Pet. ex. 14 at 8 (Mason demonstrated “significant recapture, expressive language delays, significant play skills delay, attention issues, [and] social [issues].”). The team concluded that Mason qualified for early intervention services. *See* Pet. ex. 14 at 84; *see also* Pet. ex. 14 at 8. The team recommended especially “Speech-Language Therapy as well as Occupational Therapy” and

“evaluation by a Developmental Pediatrician.” Pet. ex. 14 at 83. For whatever reason, Ms. Kay did not pursue early intervention services for Mason. *See* Pet. ex. 14 at 10.

One full year later, Mason presented to Cobb Pediatrics in Austell, Georgia, for a “well child” examination. Pet. ex. 1 at 69. Mason spoke still apparently “very few words.” *Id.* Medical personnel referred Mason for a “speech therapy” evaluation and an “audiology” evaluation. *Id.*

On September 30, 2002, Ms. Kay initiated an “educational planning” assessment for Mason through Cobb County School District Special Student Services. Pet. ex. 8 at 260. An SLP tested Mason. *See* Pet. ex. 8 at 264-68. The SLP concluded that Mason “demonstrate[d] difficulty in his development of both speech and language abilities.” Pet. ex. 8 at 266. According to the SLP, Mason’s condition rendered Mason “unable to effectively communicate with peers or adults.” *Id.* Mason met “eligibility criteria for speech impairment.” *Id.*

On October 14, 2002, a “Speech-Language Disorders Peer Review Team” from the Cobb County School District Department of Special Education considered Mason’s September 30, 2002 “Speech/Language Evaluation.” Pet. ex. 8 at 263. The team determined that Mason qualified for a “Speech-Language Program” based upon “[a]rticulation” and “[l]anguage” deficits. *Id.* An SLP scheduled a meeting with Ms. Kay to “develop” an “initial [I]ndividualized[E]ducation[P]rogram.” *Id.* at 262. The IEP provided 90 minutes of speech-language therapy in a “small group special education setting” each week. Pet. ex. 8 at 256-57.

Subsequent evaluations confirmed Mason’s speech-language delays. In February 2003, a preschool educational diagnostician noted during a “Development Educational Assessment” that Mason’s “[c]ommunication skills [were] significantly delayed,” qualifying Mason for “Significantly Developmentally Delayed” services such as special needs preschool placement. Pet. ex. 8 at 230-231. Then, in July 2003, a developmental psychologist concluded that Mason exhibited “a qualitative impairment in reciprocal communication” and “in reciprocal social interaction.” Pet. ex. 8 at 150. Likewise, in October 2003, a developmental/behavioral pediatrician diagnosed “Developmental Language Disorder.” Pet. ex. 8 at 182.

DISCUSSION

Respondent moves to dismiss. *See generally* Respondent’s Motion to Dismiss and Response to the Special Master’s November 7, 2005 Order (Motion), filed January 9, 2006; Respondent’s Renewed Motion to Dismiss (Renewed Motion), filed March 14, 2007. Respondent contends that the statute of limitations contained in § 300aa-16(a)(2) bars the petition. Respondent relies in part upon two reports from S. Robert Snodgrass, M.D. (Dr. Snodgrass), addressing the medical significance of certain notations in Mason’s medical records. *See generally* Respondent’s exhibit (R. ex.) A; R. ex. C. Dr. Snodgrass is a Professor of Pediatrics and Neurology at Geffen/UCLA School of Medicine. *See* R. ex. B at 1. He is certified in neurology, with special competence in child neurology, by the American Board of Neurology and Psychiatry. *See* R. ex. B at 2.

The Program represents a waiver of sovereign immunity. *See, e.g., Markovich v. Secretary of HHS*, 477 F.3d 1353, 1360 (Fed. Cir. 2007), citing *Brice v. Secretary of HHS*, 240 F.3d 1367, 1370 (Fed. Cir. 2001). Therefore, the special master must construe “strictly and narrowly” Program provisions. *Markovich*, 477 F.3d at 1360. Under § 300aa-16(a)(2), a petitioner seeking compensation related to an injury associated with a vaccine administered after October 1, 1988, may not file a petition “after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset” of the injury. In *Markovich*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) accorded different meanings to the word “symptom” and to the phrase “manifestation of onset.” *See Markovich*, 477 F.3d at 1357. According to the Federal Circuit, “either a ‘symptom’ or a ‘manifestation of onset’ can trigger the running of the statute, whichever is first.” *Markovich*, 477 F.3d at 1357. And, according to the Federal Circuit, “‘the first symptom of manifestation of onset,’ for the purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of” a petitioner’s alleged vaccine-related injury “by the medical profession at large.” *Markovich*, 477 F.3d at 1360. Thus, the Federal Circuit confirmed that “Congress intended the limitations period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action under the Vaccine Act.” *Markovich*, 477 F.3d at 1358.

In May 2001, appropriate professionals found, based upon appropriate testing, that Mason exhibited “[a] severe auditory comprehension deficit, a severe expressive communication deficit, significant concerns with social skills including eye contact, attention span, cooperation and interaction, significant concerns with sensory integration skills, and significant concerns with play skills.” Pet. ex. 14 at 84; *see also* Pet. ex. 14 at 8 (Mason demonstrated “significant recapture, expressive language delays, significant play skills delay, attention issues, [and] social [issues].”). Likewise, Dr. Snodgrass opines that Mason displayed “mild motor and substantial communication difficulty at the age of 24-25 months,” or in Spring 2001. R. ex. C at 2. Despite adequate opportunity, Ms. Kay did not proffer a medical opinion to rebut either the conclusions from Mason’s May 2001 evaluation or Dr. Snodgrass’s opinion. *See, e.g., Kay v. Secretary of HHS*, No. 05-0393V, Order of the Special Master (Fed. Cl. Spec. Mstr. Oct. 13, 2006). Mason exhibits still speech-language delays. *See, e.g.,* Pet. ex. 8 at 182; *see also* Pet. at 1.

The special master finds as a matter of fact that Mason showed certainly by May 2001 manifestations of his current condition. Ms. Kay commenced her Program claim on March 23, 2005. *See* Pet. The special master notes that May 2001 is between ten months and 11 months *before* the 36 months preceding March 23, 2005. Therefore, the special master rules as a matter of law that Ms. Kay filed her Program petition beyond the statute of limitations contained in § 300aa-16(a)(2).

The special master *denies* Ms. Kay's motion for a stay pending a potential petition for a writ of *certiorari* in *Markovich*. See Petitioner's Status Report, filed March 2, 2007, ¶ 4. The special master *grants* respondent's motion to dismiss. In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

s/John F. Edwards
John F. Edwards
Special Master